STATE OF MICHIGAN
IN THE SUPREME COURT

FRANK HOUSTON, ~~Chair, Oakland County Apportionment Commission~~

and

Edna Freier, Christy Jenson, Loretta Coleman, Jim Nash, David Richards and Eric Coleman,

Plaintiffs/Appellees,

vs.

~~Rick Snyder,~~ Governor of the State of Michigan,

and

Oakland County Board of Commissioners,

Defendants/Appellants.

Supreme Court No. _____

Court of Appeals No. 308724

Ingham County Circuit Court No. 12-10-CZ
Honorable William E. Collette

ACTION IS REQUESTED BY MARCH 7, 2012

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, STATUTE, RULE OR REGULATION OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

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OAKLAND COUNTY BOARD OF COMMISSIONERS' MOTION FOR IMMEDIATE CONSIDERATION OF APPLICATION FOR LEAVE UNDER MCR 7.302(1)(C)(a) TO APPEAL PRIOR TO DECISION OF COURT OF APPEALS AND TO EXPEDITE ULTIMATE RESOLUTION OF THE CASE

Defendant/Appellant Oakland County Board of Commissioners ("Oakland County"), through its attorneys, Honigman Miller Schwartz and Cohn LLP, for its Motion for Immediate Consideration of Application for Leave under MCR 7.302(C)(1)(a) to Appeal Prior to Decision of Court of Appeals and to Expedite Ultimate Resolution of the Case, states as follows:

1. On December 8, 2011, the Legislature passed 2011 PA 280, an amendment to the County Apportionment Act, MCL 46.401 *et seq.*

2. 2011 PA 280 goes into effect on March 28, 2012.

3. 2011 PA 280 amends the County Apportionment Act by: 1) reducing the maximum number of county commissioners from 35 to 21; and 2) requiring counties with populations in excess of 1,000,000, with an optional unified form of government and an elected county executive to use their board of commissioners as their county apportionment commission.

4. Procedurally, counties are required to come into compliance with 2011 PA 280 within 30 days of the effective date, meaning no later than April 27, 2012.

5. Currently, only Oakland County has more than 21 commissioners.

6. Plaintiffs filed a Complaint for Declaratory and Injunctive Relief in Ingham County Circuit Court, challenging the constitutionality of 2011 PA 280.

7. The parties each promptly filed Cross-Motions for Summary Disposition pursuant to MCR 2.116(C)(10).

8. On February 15, 2012, Ingham County Circuit Court Judge William E. Collette issued an Opinion declaring 2011 PA 280 unconstitutional. An Order was entered consistent with the Opinion on February 21, 2012.

9. Plaintiffs contend, and the Trial Court agreed, that 2011 PA 280 is a local act in violation of Const 1963, art 4, § 29, an unfunded mandate in violation of the Headlee

Amendment, Const 1963, art 9, § 29, and violates Oakland County residents' right to judicial review.

10. Specifically as to judicial review, Plaintiffs contend that if Oakland County does not finalize its new apportionment plan until the deadline, April 27, 2012, there will be insufficient time for judicial review prior to the deadline for filing for candidacy, which is May 15, 2012.

11. Oakland County prepared a Resolution to have its Oversight Committee conduct preliminary work so that a final plan could be ready for approval by Oakland County on March 28, 2012, the effective date of 2011 PA 280, leaving ample time for judicial review.

12. While complaining about an alleged lack of time for judicial review, Plaintiffs simultaneously object to the Oversight Committee conducting preliminary work prior to the effective date of 2011 PA 280.

13. Oakland County needs to undertake preparations for the apportionment plan so that it can be approved on or about the effective date of 2011 PA 280, to permit ample time for judicial review and candidate determinations by May 15, 2012.

14. Accordingly, a final decision by this Court is needed immediately.

15. Oakland County's Emergency Claim of Appeal was promptly filed with the Court of Appeals and it is reasonable to assume that the non-prevailing party would seek further relief from this Court.

16. Oakland County filed one day later its Application for Leave to Appeal Prior to Decision of the Court of Appeals.

17. This appeal must be decided promptly so that this Court may hear and resolve these constitutional issues sufficiently prior to the effective date of 2011 PA 280 such that

Oakland County can promptly prepare its apportionment plan.

18. Oakland County requests an immediate hearing on this appeal and further requests that the Court adjudicate this dispute based on the briefs filed herewith and oral argument, if deemed necessary, and otherwise expedite this case with all due and deliberate speed.

19. The other parties to this appeal have been served today via electronic mail and federal express delivery.

WHEREFORE, Defendant/Appellant Oakland County Board of Commissioners respectfully requests that this Honorable Court:

(a) grant Defendant/Appellant's Motion for Immediate Consideration of Application for Leave under MCR 7.302(C)(1)(a) to Appeal Prior to Decision of the Court of Appeals and to Expedite Ultimate Resolution of the Case;

(b) expedite consideration of this appeal;

(c) reverse the Trial Court's erroneous Opinion and Order and declare 2011 PA 280 constitutional; and

d) grant Defendant/Appellant such other and further relief as is equitable and just.

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ AND COHN LLP
Attorneys for Defendant/Appellant Oakland County Board of Commissioners

Dated: February 23, 2012

By: _____

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APPELLANT OAKLAND COUNTY BOARD OF COMMISSIONERS' APPLICATION FOR LEAVE UNDER MCR 7.302(C)(1)(a) TO APPEAL BEFORE COURT OF APPEALS DECISION

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STATEMENT IDENTIFYING ORDER APPEALED AND RELIEF SOUGHT

Appellant Oakland County Board of Commissioners appeals an order of Ingham County Circuit Court Judge William E. Collette dated February 21, 2012, granting Plaintiffs' Motion for Summary Disposition filed pursuant to MCR 2.116(C)(10) and denying Defendants' Motions for Summary Disposition filed pursuant to MCR 2.116(C)(10). (***Exhibit 1***). Appellant filed an Emergency Appeal as of Right with the Court of Appeals on February 22, 2012. Appellant is filing this Application for Leave pursuant to MCR 7.302(C)(1)(a), seeking to bypass the Court of Appeals and obtain an immediate reversal of the Trial Court's February 21, 2012 Order and declaration that 2011 PA 280 is constitutional.

STATEMENT OF QUESTIONS INVOLVED

I. Whether the Trial Court erred when it held that 2011 PA 280 violates Const 1963, art 4, § 29, even though the population classifications contained therein are unquestionably open-ended?

Plaintiffs/Appellees answer: "No"

Defendants/Appellants answer: "Yes"

Trial Court answers: "No"

II. Whether the Trial Court erred when it held that 2011 PA 280 violates the Headlee Amendment, Const 1963, art 9, § 29, even though county apportionment is not and never has been a state activity and this Act will in fact save counties hundreds of thousands of dollars?

Plaintiffs/Appellees answer: "No"

Defendants/Appellants answer: "Yes"

Trial Court answers: "No"

III. Whether the Trial Court erred when it held that 2011 PA 280 constitutes a deprivation of the rights of citizens to judicial review despite uncontradicted affidavits to the contrary?

Plaintiffs/Appellees answer: "No"

Defendants/Appellants answer: "Yes"

Trial Court answers: "No"

REASONS FOR GRANTING THIS BYPASS APPLICATION

Appellant Oakland County Board of Commissioners seeks leave to bypass the Court of Appeals and obtain immediate review and relief by this Court. As explained by this Court in *Scott v Michigan Director of Elections*, SC No. 143878 (Order issued October 20, 2011), in election-related cases where time is of the essence, litigants are "encouraged to avail themselves of this provision[.]" Bypass is appropriate here for multiple reasons:

1. The appeal is from a ruling that a Michigan statute (2011 PA 280) is unconstitutional;

2. 2011 PA 280 goes into effect on March 28, 2012;

3. The constitutional issues raised by Plaintiffs address timing concerns, including allegations of insufficient time for judicial review and filings for candidacy by May 15, 2012 for the primary election.

4. The Oakland County Board of Commissioners would like to prepare for implementation of 2011 PA 280 to avoid the timing concerns raised by the Plaintiffs.

5. The issues raised herein are significant issues for the State, concern apportionment procedures throughout the State and impact election-related filings for the primary election.

6. Given the significant issues at stake, the non-prevailing party in the Court of Appeals would most certainly seek immediate review by this Court.

7. The issues raised herein concern interpretation of the Michigan Constitution and the validity of a state statute, issues that are most appropriately decided by this Court.

I. INTRODUCTION

In an effort to reduce the size and costs of county government, the Legislature passed 2011 PA 280, which amends the County Apportionment Act, MCL 46.401 *et seq.* (the "County Apportionment Act"), to limit the maximum number of commissioners for any county with a population over 50,000 to 21. Plaintiffs contend that this amendment was a purely political maneuver, passed only to require Oakland County to prepare a new apportionment plan with fewer districts. Plaintiffs' speculation and hysteria, however, concerning the alleged motivations surrounding passage of 2011 PA 280 are not only unsupported, but completely irrelevant to the purely legal issues before the Court. *See, e.g., Michigan United Conservation Clubs v Secretary of State*, 464 Mich 359, 367; 630 NW2d 297 (2001) (Justice Corrigan concurring) ("This Court has repeatedly held that courts must not be concerned with the alleged motives of a legislative body in enacting a law, but only with the end result – the actual language of the legislation.") (citing *Kuhn v Dep't of Treasury*, 384 Mich 378, 383-84; 183 NW2d 796 (1971)).

Instead, the only relevant inquiry is whether the statute applies generally, meaning to every county that meets the population and other requirements, which 2011 PA 280 unquestionably does. Moreover, contrary to Plaintiffs' claims that 2011 PA 280 imposes an additional financial burden, this amendment will actually save Oakland County alone almost $500,000 in just two years and more than $2.5 million before the next census! Nonetheless, Ingham County Circuit Court Judge William E. Collette (the "Trial Court") accepted each and every one of Plaintiffs' political arguments, while ignoring the relevant legal authority and uncontradicted affidavits submitted by the Defendants, to conclude that 2011 PA 280 is unconstitutional. Indeed, the Trial Court completely failed to objectively review the actual language of 2011 PA 280, instead focusing solely on the fact that only Oakland County is

currently affected by this legislative amendment. The Trial Court's ruling is in blatant disregard of decades of precedent to the contrary and must be reversed.

II. STATEMENT OF FACTS

A. 2011 PA 280 amends the County Apportionment Act to Reduce the Size and Costs of County Government.

2011 PA 280 amends the County Apportionment Act in an obvious effort to reduce the size and costs of county government. 2011 PA 280 was passed on December 8, 2011, signed by the Governor on December 19, 2011 and goes into effect on March 28, 2012. ***Exhibit 2***, County Apportionment Act; ***Exhibit 3***, 2011 PA 280. Plaintiffs herein challenge the constitutionality of 2011 PA 280, claiming that because only Oakland County is currently not in compliance therewith, it must necessarily be a local act. As discussed, *infra,* however, that is not the proper test for determining whether a statute is a general law.

Section 1 of the County Apportionment Act, MCL 46.401, is amended by 2011 PA 280 to reduce the maximum number of commissioners from 35 to 21, as follows:

> Sec. 1 – Within 60 days after the publication of the latest United States official decennial census figures, the county apportionment commission in each county of this state shall apportion the county into not less than 5 nor more than ~~35~~ 21 county commissioner districts as nearly of equal population as is practicable and within the limitations of section 2.

Section 2, MCL 46.402, is likewise amended by 2011 PA 280, as follows:

County Population	Number of Commissioners
Under 5,001	Not more than 7
5,001 to 10,000	Not more than 10
10,001 to 50,000	Not more than 15
~~50,001 to 600,000~~ Over 50,000	Not more than 21

~~600,001 to 1,000,000~~	~~17 to 35~~
~~Over 1,000,000~~	~~25 to 35~~

The County Apportionment Act, as originally enacted, required compliance within 30 days of its effective date, as follows:

> In counties under 75,000, upon the effective date of this act, the boards of commissioners of such counties shall have not to exceed 30 days in which to apportion their county into commissioner districts in accordance with the provisions of this act. If at the expiration of the time as set forth in this section a board of commissioners has not so apportioned itself, the county apportionment commission shall proceed to apportion the county under the provisions of this act. [Emphasis supplied].

MCL 46.401.

Likewise, 2011 PA 280 also requires compliance within 30 days:

> If a county is not in compliance with section 2 on the effective date of the amendatory act that added this subsection, the county apportionment commission of that county shall, within 30 days of the effective date of the amendatory act that added this subsection, apportion the county in compliance with section 2. For subsequent apportionments in a county that is apportioned under this subsection, the county apportionment commission of that county shall comply with the provisions of subsection (1).[1] [Emphasis supplied].

Finally, 2011 PA 280 adds to section 3 of the County Apportionment Act, MCL 46.403, the following language:

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[1] As discussed, *infra*, the last sentence of this section was likely added to expressly clarify that the 30-day compliance period only applies to the time period following initial enactment of 2011 PA 280, not after every census, because this specific question was raised concerning the County Apportionment Act, as originally enacted. The 30-day requirement was held to apply only to the 30 days following the effective date of the act in *Kizer v Livingston Co Bd of Comm'rs*, 38 Mich App 239; 195 NW2d 884 (1972), which holding was later questioned by this Court in *In re Apportionment of Tuscola Bd of Comm'rs*, 466 Mich 78, 84 n 6; 644 NW2d 44 (2002).

> In a county with a population of 1,000,000 or more that has adopted an optional unified form of county government under 1973 PA 139, MCL 45.551 to 45.573, with an elected county executive, the county apportionment commission shall be the county board of commissioners.

In summary, 2011 PA 280 makes two substantive changes to the County Apportionment Act, by: 1) reducing the maximum number of county commissioners from 35 to 21; and 2) requiring counties with populations in excess of 1,000,000, with an optional unified form of government and an elected county executive, to use their board of commissioners as their county apportionment commission. Procedurally, counties are required to come into compliance with this amendment within 30 days of the effective date, meaning no later than April 27, 2012.

B. The Parties filed Cross-Motions for Summary Disposition.

Soon after Plaintiffs filed their Complaint for Declaratory and Injunctive Relief, the parties each filed Motions for Summary Disposition pursuant to MCR 2.116(C)(10). Plaintiffs argued that 2011 PA 280 is unconstitutional for three reasons: (1) it is a local act under Const 1963, art 4, § 29, because it currently only applies to Oakland County; (2) it violates the Headlee Amendment, Const 1963, art 9, § 29, because requiring Oakland County to conduct and prepare a new apportionment plan constitutes an unfunded mandate; and (3) it deprives Oakland County residents of their right to judicial review, because the new plan is not required to be finalized until April 27, 2012, which they claim does not allow sufficient time for judicial review prior to the deadline for filing for candidacy.

Defendants, in turn, explained that 2011 PA 280 does not violate the Constitution because: (1) it is not a local act, as it is in fact open-ended, applying to every county that should ever meet the population classifications contained therein; (2) it is not an unfunded mandate, given county apportionment is not now nor ever has been a state activity and therefore has never been paid for by the State and, regardless, will in fact save the counties hundreds of thousands of

dollars; and (3) the Oakland County Board of Commissioners has already begun the process for reapportionment and can have the new plan in place by the effective date, March 28, 2012, thereby permitting ample opportunity for judicial review. These factual contentions were supported by affidavit of the Chairperson of the Oakland County Board of Commissioners (***Exhibit 4***) and not contradicted by affidavit, or otherwise.

C. The Trial Court's Erroneous Ruling Ignores this Court's Precedent and An Uncontradicted Affidavit.

One week following oral argument, the Trial Court issued an opinion declaring 2011 PA 208 unconstitutional, disregarding (or misreading) this Court's precedent. (***Exhibit 1***) The Trial Court concluded that 2011 PA 280 is a local act solely because one of its provisions will only apply to Oakland County as of the effective date. The Trial Court further concluded that 2011 PA 280 violates the Headlee Amendment, because Oakland County has to prepare a new plan for apportionment without additional funding, yet failed to even acknowledge that Oakland County will in fact save hundreds of thousands of dollars by implementation of 2011 PA 280. Finally, the Trial Court held that 2011 PA 280 violates Oakland County citizens' right to judicial review, despite a sworn affidavit to the contrary. All of the Trial Court's erroneous holdings should be promptly reversed, because they are contrary to directly applicable legal precedent and sworn facts that are not in dispute.

D. Defendants Have Promptly Pursued Appellate Relief.

On February 21, 2012, the Trial Court issued an Order incorporating its Opinion declaring 2011 PA 280 unconstitutional. On February 22, 2012, Defendants each filed Emergency Claims of Appeal with the Court of Appeals, along with Briefs on Appeal and Motions for Immediate Consideration seeking a decision by March 7, 2012. One day later, Defendants are filing this Application for Leave under MCR 7.302(C)(1)(a) prior to a Decision

of the Court of Appeals, seeking immediate review and reversal by this Court of the Trial Court's erroneous decision.

III. ARGUMENT

A. Standard of Review

This Court reviews *de novo* a trial court's grant or denial of a motion for summary disposition under MCR 2.116(C)(10). *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the non-moving party[.]" *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court reviews *de novo* a ruling on a motion for summary disposition, *Coblentz v City of Novi*, 475 Mich 558; 567; 719 NW2d 73 (2006), constitutional issues, *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010) and the proper interpretation and application of a statute. *Id.*

B. Statutes are Presumed Constitutional.

A statute is presumed to be constitutional unless its unconstitutionality is clearly apparent. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999). The party challenging a statute's constitutionality has the burden of proving its invalidity. *People v Gregg*, 206 Mich App 208, 210; 520 NW2d 690 (1994). Furthermore, whether the legislation "appears undesirable, unfair, unjust or inhumane does not of itself empower a court to override the legislature...". *Doe v Dep't of Social Services*, 439 Mich 650, 681; 487 NW2d 166 (1992).

C. 2011 PA 280 is a General Act to which Const 1963, art 4, § 29 does not apply.

The Trial Court erroneously concluded that simply because Oakland County is the only county that is currently not in compliance, 2011 PA 280 necessarily violates Const 1963, art 4,

§ 29's prohibition against local acts. The Trial Court's conclusion is, however, directly contrary to decades of this Court's precedent on this precise issue.

Const 1963, art 4, § 29 provides that a local or special act cannot take effect until approved by two-thirds of both houses of the Legislature and by a majority of the electors within the affected district. Specifically, Const 1963, art 4, § 29, titled "Local or Special Acts" provides as follows:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

The history and rationale of this constitutional provision, which first appeared in the Constitution of 1908, primarily concerned the legislative enactment of municipal boundary changes on a case-by-case basis, resulting in a substantial burden on the Legislature and literally hundreds of pieces of such legislation. As stated in the Convention's Address to the People in 1907:

> The number of local and special bills passed by the last legislature was *four hundred fourteen*, not including joint and concurrent resolutions. The time devoted to the consideration of these measures and the time required in their passage through the two houses imposed a serious burden upon the state. This section [prohibiting the enactment of special acts when a general act can be made applicable], taken in connection with the increased powers of local self-government granted to cities and villages in the revision, seems to effectively remedy such condition... The evils of local and special legislation have grown to be almost intolerable, introducing uncertainty and confusion in the laws, and consuming the time and energy of the legislature which should be devoted to the consideration of measures of a general character. By eliminating this mass of legislation, the work of the legislature will be greatly simplified and improved.

Proceedings and Debates, Constitutional Convention 1907, pp 1422-23 (emphasis in original).

The retention of this provision in the Constitution of 1963 followed this explanation by the Committee Chairman:

> The committee recommends the retention of this section first found in the 1908 Constitution. The purpose of the section, along with the home rule provision, is to lift the burden from the legislature of passing private and local legislation.

In Re Advisory Opinion re Constitutionality of PA 1975 No. 301, 400 Mich 270, 287; 254 NW2d 528 (1977). Based on this history, it is readily apparent that Const 1963, art 4, § 29 was adopted by the People to reduce the Legislature's burden of enacting purely local acts and to ensure that such matters are instead handled by the appropriate local governments. This Court has therefore concluded that Const 1963, art 4, § 29 is only applicable to legislative action which is limited to some geographical area. *In re Advisory Opinion*, 400 Mich at 287.

It is well-established, however, that a legislative act is not necessarily local or special simply because it contains a population classification. *Lucas v Board of Road Comm'rs*, 131 Mich App 642, 652; 348 NW2d 660 (1984). An act "that contains a population requirement can be sustained as a general act if the statute is applicable whenever the population requirement is met and the population classification bears a reasonable relationship to the purpose of the statute." *Ace Tex Corp v Detroit*, 185 Mich App 609, 618; 463 NW2d 166 (1990). As recognized by this Court in *Airlines Parking, Inc v Wayne Co*, 452 Mich 527; 550 NW2d 490 (1996), the Legislature has enacted a number of laws upon a population basis which, at the time of enactment, could only apply to specific counties or cities. *Id.* at 550. "The principles upon which they have been sustained as general laws or defeated as local acts are well-established in this State and elsewhere." *Id.*

1. The population requirements of 2011 PA 280 bear a reasonable relationship to the purposes of the Act.

The first test to be applied is whether the population bears a reasonable relationship to the purpose of the statute. *City of Dearborn v Wayne Co Bd of Supervisors*, 275 Mich 151; 266 NW 304 (1936). If population is a reasonable and logical basis of classification considering the subject of the legislation, the act will not be construed as local legislation. *Id.* at 156. As explained by the Supreme Court in *Mulloy v Wayne Co Bd of Supervisors*, 246 Mich 632, 635; 225 NW 615 (1929):

> Clearly, because of its provision as to population, the act applies to Wayne county only. If it is a reasonable and logical basis of classification considering the subject of legislation, unquestionably a specified population may be made the test of the applicability of a general legislative act; and under such conditions the act will not be construed to be invalid as local legislation. But where the subject of legislation is such that a population has no obvious relation to the purpose sought to be accomplished, an attempt to make the application of the legislative act dependent on population is unwarranted and amounts to local legislation. [Citations omitted].

The Trial Court did not address this factor and there is no dispute that population classifications within a county apportionment statute are necessary and directly relate to the purposes of the act. Indeed, apportionment is, at its essence, based on population. "Where there is an obvious and intimate relationship between the population of a county and its governmental organization, a statute which distinguishes counties on the basis of population is not invalid as a local act." *Lucas,* 131 Mich App at 652. "Once the validity of a population factor is recognized, the Legislature's choice as to where to draw the line, unless patently arbitrary, must be upheld[.]" *Id.* at 654.

The County Apportionment Act was enacted in 1966 as an effort to codify apportionment procedures sufficient to effectuate the one man/one vote principle enunciated in *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964). See *Kizer, supra.* It is axiomatic that apportioning the county for district purposes must be based on population classifications. 2011

PA 280 recognizes this settled principle, but also furthers the additional goal of reducing county government in an effort to reduce costs, while still ensuring that the electors therein are properly represented.

Further, by shifting apportionment responsibility for counties over a certain population with a unified form of government to the county commissioners, 2011 PA 280 effectively furthers the goals of selecting a unified form of government in the first place, namely less boards, commissions and authorities and a centralized government. MCL 45.554. Particularly in counties with larger populations where the apportionment process can be particularly complicated, it is perfectly rational to place this burden on the commissioners elected by the voters.

2. The population classifications of 2011 PA 280 have an "open end."

The second test of a general law, based upon population, is that it shall apply to all other municipalities if and when they attain the statutory population requirements. It must have "an open end through which cities are automatically brought within its operation when they attain the required population." *City of Dearborn,* 275 Mich at 156. "The mere fact that a law only applies...to a limited number does not make it special instead of general. It may be general within the constitutional sense and yet, in its application, only affect one person or one place." *Rohan v Detroit Racing Ass'n*, 314 Mich 326, 349; 22 NW2d 433 (1946). "If the law is general and uniform in its operation upon all persons in like circumstances, it is general in a constitutional sense. Laws are general and uniform not because they operate on every person in the State, but because they operate on every person who is brought within the relations and circumstances provided for – not because they embrace all of the governed, but because they may embrace all – if the persons governed occupy the position of those who are embraced." *Id.* at 350.

The "probability or improbability of other counties or cities reaching the statutory standard of population is not the test of a general law." *Dearborn,* 275 Mich at 157. Instead, it must be assumed that other local units of government will be able to reach the population goal and other requirements. *Id.* See also *Moore v Detroit School Reform Bd*, 293 F3d 352, 362 (CA 6, 2002) ("[A]lthough the [act] applies only to Detroit at the present time, it contains language of general applicability. The fact that other school districts might never become first-class school districts does not render the act a local [act].").

a. Michigan Courts Have Routinely Upheld Statutes That Apply Only to one City or County at the time of Enactment.

In *McClary, et al v State Gaming Control Bd*, 2005 WL 1651709 (2005) (***Exhibit 5***), for example, the plaintiffs challenged the Michigan Gaming Control and Revenue Act, MCL 432.201 *et seq* (the "Gaming Act") as a local act, because no city other than Detroit could meet the Gaming Act's definition of city, which required a population of at least 800,000 at the time a license was issued, to be located within 100 miles of any other state or country in which casino gaming was permitted on December 5, 1996, and had a majority of voters who expressed approval of casino gaming in the city. At the time the Gaming Act went into effect, the only local unit of government that had met the population requirement was the city of Detroit. Plaintiffs argued that even if the statute's population requirement could be met by another city in the future, the additional requirement that the local unit of government be within 100 miles of a state or country that permitted gaming on December 5, 1996, effectively precluded any local governmental unit from ever qualifying, contrary to this Court's precedent set forth in *Dearborn*, *supra*, which had held that the test of the general law based on population required that all of the municipalities would be subject to the act if and when they attained the statutory population. In *State v Wayne Co Clerk,* 466 Mich 640; 648 NW2d 202 (2002), however, this Court restated the

test as whether "it is possible that other municipalities or counties can qualify for inclusion if their populations change." (Emphasis supplied). 466 Mich at 642. Thus, "the rule is whether other municipalities can qualify should their populations reach the required level and not whether every municipality within the state could theoretically meet the requirements." *McClary, supra,* at *2. Because the 100-mile rule did not preclude every other unit of government from qualifying under the statute and at least one other unit of government could qualify should its population ever reach 800,000, the Gaming Act was held to be a general act, not subject to the requirements of Const 1963, art 4, § 29. *Id.*

Likewise, in *Moore v School Reform Bd of the City of Detroit*, 147 F Supp 2d 679 (ED Mich 2000), *aff'd* 293 F3d 352 (CA 6, 2002), the plaintiffs contended that the School Reform Act, which established a new school board for the City of Detroit, violated Const 1963, art 4, § 29, because it only applied to one city, even though it was worded as applying to "qualifying" school districts, meaning districts of at least 100,000 students. The School Reform Act, as originally enacted, also provided a time limit for mayoral appointees to the School Reform Board by providing "not later than thirty (30) days . . .the mayor shall appoint a school reform board."

The plaintiffs argued that these limitations were analogous to those addressed in *Mulloy, supra*, and therefore a local act. The Court flatly rejected that argument, noting that the statute in *Mulloy* clearly only applied to Wayne County, specifically referred to "the" county and was a closed class to which no other county could even enter. 147 F Supp 2d at 690. In contrast, the School Reform Act was permissive and open-ended and the amendment was clearly intended to clarify that it applied both to those cities that qualified as of the effective date of the act and thereafter. *Id.*

The Sixth Court affirmed and directly addressed the plaintiffs' contention that the Legislature enacted the School Reform Act solely to apply to the Detroit Public Schools, as follows:

> According to the Plaintiffs, the Defendants cannot maintain that the [School Reform Act] is a law of general application while simultaneously justifying it as necessary to address the problems of Detroit's schools. This argument, however, fails to recognize that even though the circumstances in a particular city or county might lead the Legislature to enact a statute, the resulting legislation can nevertheless be general if it contains population classifications that are reasonably related to the subject matter at issue. Indeed, Detroit's problems may be indicative of the unique challenges that all large urban school districts confront, thus suggesting that Detroit serves as only the current example of the reason to treat first-class school districts differently.

293 F3d at 352.

Wayne Co Clerk, *supra,* the case upon which Plaintiffs, the Trial Court (and the *McClary* Court) primarily rely, is easily distinguishable from the case at bar and, as explained by the *McClary* Court, actually supports the validity of 2011 PA 280. *In Wayne Co Clerk*, an amendment to the Home Rule Cities Act required a city with a population of not less than 750,000 as determined by the U.S. Census, and with a city council of nine at-large council members, to place a question on the August 2002 ballot concerning whether to abolish the at-large council. *Id.* at 642. At the time of enactment, the amendment only applied to the City of Detroit. This Court took no issue with the population requirement, but rather that the provision had to be placed on the August 2002 ballot. Because there would be no new census until after the date of the election, it was impossible for the amendment to ever apply to another city. *Id.* at 643. Therefore, had the requirement not been tied to the 2002 election, and simply provided that cities with populations over 750,000 must place the issue on the ballot at the "next general

election" or something to that effect, the amendment would not have been deemed a local act in violation of the Constitution.

2011 PA 280 amends the County Apportionment Act in two substantive respects. First, it reduces the maximum number of county commissioners from 35 to 21 for populations over 50,000. Second, it requires counties with populations over 1,000,000, a unified form of government and an elected county executive, to use their county commission as their apportionment commission. Neither of these requirements are temporally limited. They apply now, ten years from now, and for all future apportionments.

b. 2011 PA 280's Requirement that Counties over 50,000 are limited to 21 Commissioners is not limited to one County.

The Trial Court concluded that 2011 PA 280 was a local act simply because it only impacts Oakland County at this time. 2011 PA 280, however, applies to multiple counties, indeed every county with a population over 50,000. Just because Oakland County is the only county that currently has more than 21 commissioners, does not mean it is the only county to which the amendment applies. 2011 PA 280 reduces the maximum number of commissioners within a county from 35 to 21. The Trial Court's focus on the fact that as of right now only Oakland County has more than 21 commissioners, is simply not the proper inquiry. The question is does the population classification apply to a municipality who achieves that level, and the answer, unequivocally, is yes.

The reduction of allowable commissioners applies immediately to every county with a population over 50,000, which includes multiple counties, not just Oakland County. There are at least 35 counties that this limitation will apply to upon the effective date, and it will continue to apply to every county that ever reaches 50,000 in the future. The Trial Court's conclusion, therefore, that this limitation applies only to Oakland County is therefore categorically false.

The limitations imposed by 2011 PA 280, unlike those set forth in *Wayne Co Clerk* and *Mulloy, supra,* do in fact apply to any county that meets the population requirements following the next census. In *Wayne Co Clerk*, any city that met the population classification and other requirements had to place an issue on the August 2002 ballot. It was therefore impossible for any county to be subject to that statute's requirements following 2002. In contrast, the provisions of 2011 PA 280 apply to each and every county that meets the population classification and other requirements now or following the next census and thereafter. It is therefore, by definition, "open-ended."

As discussed *supra*, that the 2011 PA 280 amendment only applies to one county at the time of enactment is irrelevant to this constitutional analysis. Another county could choose to have more than 21 county commissioners prior to the effective date of the 2011 PA 280, or might have chosen to do so in the future had this amendment not been passed. Nonetheless, the Trial Court focused almost exclusively on the fact that no other county is or could be affected right now, which is simply a red herring. Any county over 600,000 currently could have more than 21 commissioners and could arguably do so prior to the effective date of the Act,[2] but that fact is just not relevant to this analysis. *See, e.g. GM Corp v Dep't of Treasury*, 290 Mich App 355, 379; 803 NW2d 698 (2010) ("[T]he fact that other vehicle manufacturers decided not to seek a use tax refund does not mean the act does not apply to [them]"). Multiple counties could have chosen to have more than 21 commissioners, just like Oakland County, and no longer can do so.

Rather than look at the open-ended population and other classifications contained within 2011 PA 280, the Trial Court focused solely on the procedural requirement that counties achieve compliance with 2011 PA 280 within 30 days of the effective date. This compliance provision

[2] Wayne, Oakland, Macomb and Kent all have populations over 600,000.

is, however, merely a procedural requirement specifying a time period during which compliance must be achieved, precisely the same 30-day requirement included within the County Apportionment Act, as originally enacted. Indeed, when the County Apportionment Act was first enacted, counties also had 30 days in which to comply with the limitations as to the number of commissioners. Plaintiffs' focus on the language in subsection 1(2), which provides "For subsequent apportionments in a county that is apportioned under this subsection, the county apportionment commission of that county shall comply with the provisions of subsection (1)," to support their position. Yet this provision merely clarifies that the 30-day requirement only applies upon the effective date of 2011 PA 280 and not to future apportionments, and was obviously added to address the argument made years ago that the 30-day requirement began anew following each reapportionment, which argument was rejected by the Court of Appeals in *Kizer, supra*, but later questioned by this Court in *In re Reapportionment of Tuscola Bd of Commr's, supra*. Obviously, the Legislature did not want the 30-day provision to be once again considered ambiguous, so it expressly clarified the time period to which it applied. See *Chamski v Cowan,* 288 Mich 238, 258; 284 NW 711 (1939) (clauses that are included to "promote speedy action on the part of counties having the required population" do not render the statute a local act).

Moreover, contrary to the Trial Court's conclusion otherwise, it is possible for Wayne County, for example, to modify its charter prior to the effective date of 2011 PA 280 to have more than 21 commissioners. If it did so, it would be required to come within compliance of 2011 PA 280 upon the effective date. Contrary to Plaintiffs' assertions otherwise, and the conclusion reached by the Trial Court, the Wayne County Charter does not specify when a vote by the electors must be held should the Commission itself decide to seek an amendment to the

Charter. The constitutional provisions requiring such amendments to be voted on at the next general election, as referred to by the Trial Court, only apply to amendments enacted by citizens. It is therefore at least possible for Wayne County to have been subject to the compliance requirements of 2011 PA 280. While this is admittedly improbable, particularly given passage of 2011 PA 280, that is not the test of a general law. *See Dearborn*, 275 Mich at 157 (the "probability or improbability of other counties or cities reaching the statutory standard of population is not the test of general law").

Plaintiffs argued, and the Trial Court apparently agreed, that it should examine the particulars of each county's governance requirements to determine whether they could have in fact increased the number of county commissioners prior to the effective date of 2011 PA 280 to determine whether it is a local or general act. Examination of each county's internal governance procedures is not, however, required and is in fact entirely impractical. Counties can, and often do, change their forms of governance, so an examination of what is in effect now may not even be accurate three years from now, but 2011 PA 280 will still be in effect. Wayne County, Monroe County and Kent County could easily amend their Charters prior to the next census and provide for more than 21 commissioners, absent 2011 PA 280. Multiple other counties could exceed the 600,000 (and over 50,000) population requirement in the future and be prohibited from having more than 21 commissioners. Just because Plaintiffs, and the Trial Court, find these scenarios unlikely, does not render the amendments unconstitutional.

c. 2011 PA 280's Requirement that the Board of County Commissioners Constitute the Apportionment Commission is "open-ended."

The second substantive requirement of 2011 PA 280 provides that for any county with a population over 1,000,000 that has adopted a unified form of government and an elected county executive, the county apportionment commission shall be the county board of commissioners.

On its face, this statutory requirement applies to every county that achieves the necessary population and chooses a unified form of government at any time in the future. The apportionment process occurs every ten years. It is certainly possible that other counties will meet those requirements within that timeframe. Bay County, for example, already has a unified form of government and could achieve the 1,000,000 population in 10 years. Kent County and Macomb County already have a population exceeding 1,000,000 and could elect a unified form of government. Multiple other counties could also meet these requirements, whether it be 10 or 20 years from now, by population changes and/or by choosing to have a unified form of government.

2011 PA 280's requirement concerning the composition of the county apportionment commission applies to each and every county that ever meets the three stated requirements and there is no time limitation for doing so. Because multiple counties could easily achieve this result, certainly by the next census, 2011 PA 280 easily passes the "test" for a general law as to this population classification.

D. 2011 PA 280 is not an Unfunded Mandate as Prohibited by the Headlee Amendment.

Const 1963, art 9, § 29, otherwise known as the Headlee Amendment, is intended to prevent the state from shifting responsibility for services it was previously providing to local governments without appropriate funding. See *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 603; 597 NW2d 113 (1999); *Durant v State Board of Ed*, 424 Mich 364, 379; 381 NW2d 662 (1986). Accordingly, the Headlee Amendment prohibits the State from placing two related but independent burdens on local governmental entities. First, the State may not reduce the state financed proportion of the necessary costs of any existing activity or service that the state law requires of local units of government. *Adair v Michigan*, 486 Mich 468, 478; 785 NW2d 119

(2010). Second, no state agency, including the Legislature, may require a new activity or service by a local unit of government without funding for the local unit of government to pay for the necessary increased costs. *Id.* The Court has described the first requirement as the "maintenance of support" or MOS provision and the second requirement as the "prohibition of unfunded mandates" or POUM provision. *Id.*

Plaintiffs herein only challenged 2011 PA 280's requirement that counties come in compliance within 30 days after the effective date as a violation of the POUM provision. The Court has held that to establish a violation of the POUM clause, however, a plaintiff must show that the State has issued a mandate that requires local units to perform an activity that the State previously did not require local units to perform or at an increased level from that previously required of local units. *Judicial Attorneys Ass'n*, 460 Mich at 606.

Legislative changes that do not benefit the State therefore do not implicate the Headlee Amendment.

> While the state can, and sometimes does, mandate higher standards, benefits and so forth, it does not necessarily profit from increasing these standards, and, therefore, the kind of escape hatch for the state that the Headlee Amendment was intended to head off is not created. Unlike the shifting of traditional state finances to units of local government, increasing the costs of services that are performed predominately by units of local government does not lessen the state's financial burden.

Livingston Co v Dep't of Mgt and Budget, 430 Mich 635, 645; 425 NW2d 65 (1988).

Plaintiffs contend that 2011 PA 280 requires Oakland County to engage in a new activity (a second apportionment of county commissioner districts) without adequate funding. Oakland County, however, was already required under the County Apportionment Act to undertake the apportionment process and budgeted accordingly. MCL 46.401. The State does not fund this process currently and will not do so upon enactment of 2011 PA 280, which is merely an

amendment to the County Apportionment Act. Requiring Oakland County to prepare a new plan does not shift any State burden, because it was never the State's burden to shift. Therefore, because 2011 PA 280 does not require a "new" level of activity by counties, the Headlee Amendment cannot be implicated.

Nonetheless the Trial Court concluded that although 2011 PA 280 did not require a "new activity" by Oakland County, it does require an "increased level of activity" by requiring the County to prepare a second apportionment plan consistent therewith and that Oakland County will incur some minimal costs (approximately $8,000) as a consequence thereof. The Trial Court, however, not only disregards the requirement that the State be shifting an obligation to local government, but also the statutory provision that requires a determination of whether there is an offset of savings. The Trial Court also ignored the uncontradicted affidavit stating that Oakland County will in fact save hundreds of thousands of dollars in just the first two years by implementation of 2011 PA 280.

In fact, the POUM clause only requires funding to offset the "necessary increased costs" from such activity. If there are no necessary increased costs, there can be no violation.

MCL 21.233 provides the definition of necessary costs as follows:

> (6) "Necessary costs" means the net cost of an activity or service provided by a local unit of government. The net cost shall be the actual cost to the state if the state were to provide the activity or service mandated as a state requirement, unless otherwise determined by the legislature when making a state requirement. Necessary cost does not include the cost of a state requirement if the state requirement satisfies 1 or more of the following conditions:
>
> (a) The state requirement cost does not exceed a *de minimus* cost.
>
> (b) *The state requirement will result in an offsetting savings to an extent that, if the duties of a local unit which existed before the effective date of the state requirement are considered,*

> *the requirement will not exceed a de minimus cost.* [Emphasis supplied].
>
> (c) The state requirement imposes additional duties on the local unit of government which can be performed by that local unit of government at a cost not to exceed a *de minimus* cost.
>
> (d) The state requirement imposes a cost on a local unit of government that is recoverable from a federal or state categorical aid program or other external financial aid. A necessary cost excluded by this subdivision shall be excluded only to the extent that it is recoverable.

The Trial Court concluded that because 2011 PA 280 requires Oakland County to prepare a revised plan of apportionment in conformity therewith, without an appropriation, it necessarily violates the Headlee Amendment's POUM provision. The reality is, however, that the software, computers, etc. required to prepare the revised apportionment plan are already in place. *Exhibit 4*, Affidavit of Michael J. Gingell at ¶¶ 3-4. Moreover, the licenses for the software remain valid and the necessary staff have already been trained. *Id.* The "new" plan merely requires forming new districts, which the computer can do with the software that the County has already purchased. *Id.* Because everything is currently available, has already been budgeted and paid for, the additional costs associated with reapportionment are quite minimal, likely not to exceed $8,000.00. *Id.*

In contrast, the cost savings for the reduction in commissioner districts is substantial and almost immediate. Contrary to what Plaintiffs suggest, these savings are not theoretical or far into the future. The savings during the first two-year term alone, commencing January 1, 2013, will exceed $450,000.00, easily offsetting the $8,000.00 in costs. Gingell Affidavit at ¶ 5. 2011 PA 280 would therefore save Oakland County at least $2.5 million between January 1, 2013 and the next United States Census. *Id.* Accordingly, the costs associated with preparing the revised apportionment plan are easily offset by the amount Oakland County will save as a

consequence of 2011 PA 280. *Id.* at ¶¶ 5-6. This affidavit was not countered in any regard and the facts are not in dispute, yet were not even considered by the Trial Court.

E. There will be Sufficient Time for Judicial Review and Candidate Determinations.

Plaintiffs' final arguments, which are integrally related, relate solely to timing. Because 2011 PA 280 will not go into effect until March 28, 2012, Oakland County has 30 days from that date, *i.e.* April 27, 2012, to prepare a revised apportionment plan. May 15, 2012 is the filing deadline for candidates for the August primary election. Pursuant to the County Apportionment Act, however, registered electors have 30 days in which to file a petition with the Court of Appeals for judicial review of the plan. MCL 46.406. While not agreeing that 2011 PA 280 violates the Constitution by requiring counties to promptly come within compliance, Oakland County recognizes the need for expediency and finality of the revised plan. Accordingly, on January 19, 2012, the Oakland County Board of Commissioners considered a Resolution to immediately begin the process for county reapportionment consistent with 2011 PA 280. Gingell Affidavit at ¶ 7; Resolution attached thereto.

The Resolution provides that pursuant to 2011 PA 280, the Board of Commissioners shall serve as the County Apportionment Commission. *Id.* at ¶ 8; *Id.* The Board of Commissioners referred this matter to the Board of Commissioners Oversight Committee to prepare a draft appropriation plan consistent with 2011 PA 280. *Id.* at ¶ 9. The Board of Commissioners intends to have a final apportionment plan consistent with 2011 PA 280 no later than March 28, 2012, the effective date of 2011 PA 280. Accordingly, even if interested parties choose to wait the full 30 days to trigger judicial review, which is unlikely in this instance, there shall remain ample time for appellate review prior to candidates having to make their decisions and file for placement on the primary ballot.

Nonetheless, the Trial Court completely discounted this Affidavit, although it was not contradicted, and concluded that the Board of Commissioners might wait until April 27, 2012 to approve its final plan, therefore leaving insufficient time for review.

The Trial Court abused its discretion by rejecting the Affidavit altogether without any evidence to the contrary in a Motion for Summary Disposition filed pursuant to MCR 2.116(C)(10). Further, even if the Board of Commissioners waited until the last possible day to file its plan, an extremely unlikely scenario, there would be sufficient time for judicial review in the 18 days before candidate filings are due. Both the Court of Appeals and this Court have historically been willing to decide election-related cases on an expedited basis, recognizing the need for prompt decisions in this context, and there is no reason to believe it would not be done in this instance as well. Regardless, none of these issues need even be of concern as long as this Court rules expediently on this appeal, thereby permitting Oakland County to finalize its plan on or about March 28, 2012.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Defendant/Appellant Oakland County Board of Commissioners submits that 2011 PA 280 easily passes constitutional muster and requests the following relief:

(a) grant Defendant/Appellant's Motion for Immediate Consideration of Application for Leave under MCR 7.302(C)(1)(a) to Appeal prior to Decision of Court of Appeals and to Expedite Ultimate Resolution of the Case;

(b) reverse the Trial Court's erroneous Opinion and Order and declare 2011 PA 280 constitutional;

(c) grant Defendant/Appellant such other and further relief as is equitable and just.

Respectfully submitted,

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